KASI ARUNACHALAM CHETTIAR

v.

AR KAVERI ACHI

COURT OF APPEAL, KUALA LUMPUR
NH CHAN JCA
ABU MANSOR ALI JCA
ABDUL MALEK AHMAD JCA
[CIVIL APPEAL NO: W-02-79-97]
24 APRIL 1998

LAND LAW: *Caveat - Application for removal of - Whether appellant has legal interest - Whether caveats to be entered by interested parties only*

SUCCESSION: *Probate - Validity of will - Contention of procedural defect and testamentary incapacity - Issues already decided by foreign court - Whether matter res judicata*

SUCCESSION: *Probate - Validity of will - Effects of - Whether affects enforceability of caveats*

The matter originated from the execution of the will of one Chidambaran Chettiar ('Chettiar'). Chettiar had two wives, one Meenakshi ('the senior wife') and another, Alagammai ('the junior wife'). The senior wife passed away in 1947. Upon Chettiar's death in 1968, the junior wife, who was appointed as executrix, was bequeathed the entire estate except for Rs7,000.

The senior wife's daughter, also named Meenakshi ('the daughter'), married one Ramasamy. Together, they had four children, one of them was also named Meenakshi ('the granddaughter'). The daughter passed away in 1984. Ramasamy was stated to be the lawful beneficiary of the daughter's estate.

The junior wife had appointed Kaveri ('the respondent') as her executrix. Kasi, ('the appellant') acting as agent to Ramasamy entered a caveat and also another against the respondent on behalf of the latter's children, alleging that they were the beneficiaries to the movable property of the junior wife if she had died intestate. The appellant then sought to challenge the validity of the will on the grounds that there existed a procedural defect and testamentary incapacity.

The respondent had petitioned the High Court to set aside the first and the second caveats entered by the appellant and judgment was given in her favour. The appellant, dissatisfied with the judgment, appealed to this court to set aside the judgment of the learned trial judge.

Held:
Per Abu Mansor Ali JCA

[1] The application for the dismissal of the two caveats filed by the appellant must depend on whether the granddaughter had any interest in her grandfather's estate under his will.

[2] In the absence of other applications to set aside the decree given in India, the proper approach to be adopted was that the matter was *res judicata*, and parties were estopped from challenging the validity of Chettiar's will.

[3] It would be correct to say that the failure of the appellant, to have the will invalidated, the object of which the first caveat was lodged, rendered the caveat ineffectual.

[4] In Form 173, it is the caveator or his solicitor who must sign the form. There is no provision for the attorney to sign the form. What is equally material is that the caveator's name must be entered as the person having interest to be protected even though the form is signed by his solicitor if he or she is so represented. Under s. 33 of the Probate and Administration Act 1959, the caveator must be a person with interest.

[5] Based on the existing facts, it could not be seen from where the appellant derived his interest which could be protected by the caveats. Looking at Suit No. S6-22-318-88, it was concluded that neither the appellant nor the plaintiff had any interest in the will which the caveat sought to protect.

[6] Additionally, there was no declaration by any Malaysian court that Chettiar's will was invalid. Furthermore, the Indian courts had confirmed Alagammai's will.

[7] Prolonging the litigation would have the effect of preventing the successful party from extracting a grant of probate, especially so when there was no reasonable basis to question the validity of both Chettiar's and Alagammai's wills. Therefore, the application to set aside the first and second caveats had to be allowed.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation of Headnotes]*

Hal ini bermula dengan perlaksanaan wasiat Chidambaran Chettiar ('Chettiar'). Chettiar mempunyai dua orang isteri iaitu Meenakshi ('isteri pertama') dan seorang lagi, Alagammai, ('isteri kedua'). Isteri pertamanya meninggal dunia pada tahun 1947. Apabila Chettiar meninggal dunia dalam tahun 1968, isteri keduanya, yang dipilih sebagai pelaksana, telah diwariskan dengan segala estet Chettiar, kecuali Rs.7,000.

Anak isteri pertama, yang juga bernama Meenakshi ('si anak'), telah berkahwin dengan Ramasamy. Mereka mempunyai empat orang anak-anak dan salah satu dari mereka juga bernama Meenakshi ('si cucu'). Si anak meninggal dunia dalam tahun 1984. Ramasamy dikatakan menjadi penerima harta isterinya.

Kaveri ('pihak responden') telah dipilih oleh isteri kedua sebagai pelaksana estetnya. Kasi ('pihak perayu') yang bertindak sebagai agen kepada Ramasamy, telah memasukkan kaveat dan satu lagi bagi pihak anak-anak Ramasamy atas alasan bahawa merekalah waris kepada harta alih isteri pertama jika beliau telah meninggal dunia tanpa wasiat yang sah. Pihak perayu kemudiannya mencabar keesahan wasiat isteri kedua di atas alasan bahawa terdapat salahlaku prosedur dan ketidakupayaan perwasiatan.

Pihak responden telah mempetisyenkan kepada Mahkamah Tinggi untuk mengenepikan kaveat pertama dan kedua tersebut. Penghakiman diberi kepadanya. Pihak perayu tidak berpuas hati dengan keputusan ini dan telah merayu kepada mahkamah ini untuk mengenepikan keputusan hakim yang bijaksana tersebut.

Diputuskan:
Oleh Abu Mansor Ali HMR

[1] Permohonan untuk memansuhkan kedua petisyen tersebut yang dimasukkan oleh pihak perayu mesti bergantung kepada samada si cucu mempunyai apa-apa kepentingan terhadap estet Chettiar seperti yang terkandung dalam wasiatnya.

[2] Dengan tidak terdapatnya permohonan-permohonan lain untuk mengenepikan dekri yang dikeluarkan di India, maka hal ini sepatutnya dianggap sebagai *res judicata* dan mana-mana pihak diestop dari mencabar keesahan wasiat Chettiar.

[3] Adalah tepat untuk mengatakan bahawa kegagalan pihak perayu untuk membatalkan wasiat tersebut, yang menjadi objek untuk kemasukkan kaveat pertama, menjadikan kaveat tersebut tidak berhasil.

[4] Dalam Borang 173, hanya pengkaveat atau peguamnya yang mesti menandatangani borang tersebut. Tidak terdapat apa-apa peruntukan untuk peguam tersebut menandatangani borang tersebut. Turut penting ialah nama pengkaveator mesti dimasukkan sebagai orang yang mempunyai kepentingan yang harus dilindungi, walaupun borang tersebut ditandatangai oleh seorang peguam jika pihak tersebut diwakili. Di bawah s. 33 Probate and Administration Act 1933, pihak pengkaveat mestilah mempunyai kepentingan.

[5] Berpandukan fakta-fakta, tidak terlihat di mana pihak perayu mendapat kepentingan yang patut dilindungi oleh kaveat tersebut. Melihat kepada guaman no. S6-22-318-88, kesimpulan yang boleh dibuat adalah pihak perayu atau pihak plaintif tidak mempunyai kepentingan di bawah wasiat tersebut yang dilindungi oleh kaveat untuk pihak pengkaveat mempunyai sebab untuk mempertahankannya.

[6] Tambahan pula, tidak ada penghakiman yang dikeluarkan oleh mana-mana mahkamah Malaysia yang membatalkan wasiat Chettiar. Mahkamah di India telah juga mengesahkan wasiat Alagammai. Merujuk kepada kepentingan keempat-empat cucu Chettiar, mereka, secara individu, patut memfailkan kaveat sebagai pihak yang mempunyai kepentingan.

[7] Dengan memanjangkan kes ini akan mempunyai kesan menghalang pihak yang berjaya untuk mengeluarkan geran probet, terutama sekali di mana tidak terdapat apa-apa sebab yang munasabah untuk mempertikaikan keesahan wasiat-wasiat Chettiar dan Alagammai. Oleh itu, permohonan untuk mengenepikan kaveat pertama dan kedua dibenarkan.

[Rayuan ditolak.]

Legislation referred to:
Probate and Administration Act 1959, s. 33
Rules of the High Court 1980, O. 18 r. 19, O. 71 r. 37(3)

For the appellant - Tun Salleh Abas (Kerpal Singh with him); M/s U Harcharan & Kerpal
For the respondent - Lorraine Cheah (Shanti Mogan with her); M/s Shearn Delamore & Co

[Appeal from High Court, Kuala Lumpur; Probate Petition No: S5-45-241-87]

Reported by Bhawani Mano

JUDGMENT

Abu Mansor Ali JCA:

This is an appeal by the appellant/caveator against the judgment of the learned Judicial Commissioner given on 17 February 1997 allowing the application of the respondent/petitioner to set aside the first and second caveats entered by the appellant.

The facts of this case are as follows. On 12 June 1964 one Chidambaram Chettiar (Chettiar) executed a will in India (first will). We are not directly concerned with this first will. Chettiar had two wives, Meenakshi Achi (the senior wife) and Alagammai Achi (the junior wife).

Meenakshi Achi passed away in 1947 and she was survived by her daughter Meenakshi. This Meenakshi married Ramasamy, and with him she had four children. They are Veerappan, Umayal, Valliamai and Meenakshi.

Chettiar passed away in 1968 after having appointed Alagammai as his executrix and bequeathed his entire estate, except Rs7,000, to Alagammai.

Alagammai in turn executed her will on 12 April 1982 and appointed her sister Kaveri Achi (Kaveri) as her executrix. Alagammai bequeathed her entire estate to Kaveri on condition that Kaveri adopted a boy and maintained him until majority after which he is to be married to Alagammai's niece. At the same time after majority, half of the estate was to be given to the adopted son and the balance for Kaveri's benefit.

The next event having a bearing on this property was in 1984 when Meenakshi died followed by Alagammai in 1985.

In respect of Alagammai's estate, two caveats had been entered. We refer now to the first caveat entered by the respondent Kasi (the first caveator), the appellant herein, who is acting as agent of Ramasamy who, is stated to be the lawful beneficiary of Meenakshi's estate.

A point worth noting at once is that Chettiar had left a will in which he bequeathed almost his entire estate to Alagammai. It therefore would mean that interest in the first caveat could only be sustained by Meenakshi, as the daughter of Chettiar, in the event that the Chettiar's will is declared invalid.

Kasi also filed a second caveat. This time he was acting as agent for alleged beneficiaries as follows:

(1) Veerappan;

(2) Umayal;

(3) Valliammi;

(4) Meenakshi,

who are the issues of Meenakshi and Ramasamy and grandchildren of Chettiar. The caveator Kasi stated that the four persons, he represented, are the beneficiaries to the movable property of Alagammai (deceased) if she had died intestate.

We think it is correct to say that the application to apply for the dismissal of the two caveats filed by the caveator Kasi must depend on whether Meenakshi has any interest in her grandfather's estate under Chettiar's will. That in turn provokes the question whether Chettiar's will which virtually excluded her is valid and binding.

The caveator Kasi submitted that the Chettiar's will is invalid because he say(s) there exists a procedural defect and testamentary incapacity. In any case, the caveator Kasi argued that the Indian Court's decree that the Chettiar's will is invalid could not be overcome by a Memorandum of Compromise executed between Alagammai and Meenakshi.

The respondent's answer to this submission was that the question of the validity of the will is now for the time being settled in India by the Memorandum of Compromise and the fact is recorded in the Indian Court that Meenakshi acknowledged and confirmed that the will executed by Chettiar in favour of Alagammai is true, valid and binding.

We are in agreement with the view taken by the lower court that, in the absence of any other application, to set aside the decree given in India, the proper approach to be adopted is that the matter is *res judicata* and parties are estopped from challenging the validity of Chettiar's will. We agree with the approach of the learned Judicial Commissioner. On this ground alone, we feel the petition should succeed.

After the filing of the first caveat, Kasi, the appellant/caveator, filed a civil suit to declare Chettiar's will invalid. In lodging the second caveat, the caveator Kasi described his interest as that of Meenakshi's interest. If we may remember, Meenakshi was Ramasamy's wife and the daughter of the Chettiar. Since the will in favour of Alagammai is true and valid as referred to above, this is the end of this submission.

The writ, however, was met by the application of Kaveri Achi, the petitioner who applied under O. 18 r. 19 of the Rules of the High Court 1980 (the Rules) to have the suit struck off. That application succeeded and in an appeal the petitioner was again successful in having the appeal dismissed before the judge in Chambers. A certificate of no further argument was subsequently issued and no further appeal was lodged.

It is correct to say that the failure of the caveator Kasi to have the will invalidated, the object of which the first caveat was lodged, renders the caveat ineffectual. This position is further enforced as referred to above by the fact that the matter of the validity has been concluded by the Madras High Court decision that the will was decreed to be valid and therefore *res judicata*.

We now turn to the second caveat. In discussing this caveat, we have to go back to Alagammai's will since the interest it seeks to protect hinges on Alagammai's estate.

A point to notice is that the validity of Alagammai's will was challenged twice in two levels of the Indian Court and was held by that court to be valid. No doubt there is an appeal but the position we have to take is that there is no stay and it has to be construed as valid and binding until the contrary is shown. As far as the adoption provision went, the Indian Judge held it was not a condition precedent to render the will invalid and unenforceable.

The learned Judicial Commissioner also examined the *locus standi* of the caveator Kasi. Did the caveator Kasi have *locus standi*? She had present in her mind, and quite properly so, O. 71 r. 37(3) of the Rules which states:

> (3) Any person who wishes to enter a caveat (in this rule called "the caveator") may do so by filing the caveat Form 173 in the Registry and obtaining an acknowledgement of entry from the proper officer, or by sending through the post at his own risk the caveat to the Registry.

In her judgment, the learned Judicial Commissioner correctly addressed her mind that in Form 173 it is the caveator or his solicitor who must sign the form. There is no provision for an attorney to sign the form. What is equally material is that the caveators' names must be entered as the person having interest to be protected even though the form is signed by his solicitor if he or she is so represented. Under s. 33 of the Probate and Administration Act 1959 the caveator must be a person with interest.

For this reason, we are with the learned Judicial Commissioner when she held that she could not see where Kasi, the caveator, derives his interest which could be protected by the caveats. We also agree with her conclusion that the caveator and plaintiff in suit No. S6-22-318-88 has no *locus standi* by reason of his having no interest in the will which the caveat sought to protect for the caveator to sustain.

This is followed and enforced by the fact that there is absence of any declaration by any Malaysian court that Chettiar's will is invalid and the Indian court confirming Alagammai's will. As regards the interest of the four grandchildren of Chettiar, it is for each of them to have filed a caveat as having any interest, if any.

We are also with the learned Judicial Commissioner in her conclusion on the undesirable effect it would have of prolonging litigation which has the effect of preventing the successful party from extracting the grant of probate especially so when there is no reasonable basis to question the validity of both Chettiar's and Alagammai's wills.

We agree with the learned Judicial Commissioner for the reasons given above that the application to set aside the first and second caveats be allowed. This being our decision, we find no merit in this appeal and we hereby do dismiss it with costs.